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IN THE

# Supreme Court of the United States

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October Term, 1955

No. [redacted] 91

DAVID S. ALBERTS,

*Appellant,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

## JURISDICTIONAL STATEMENT.

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## SUBJECT INDEX


PAGE

Opinions below ..... 1

Jurisdiction ..... 2

Statute involved ..... 3

Constitutional questions presented ..... 4

Nature of the case ..... 5

The federal questions presented are substantial ..... 9

I.

The California Penal Statute—proscribing "obscene and indecent" writings and books—upon its face and as construed and applied to appellant violates freedom of speech and press, and conflicts with the decision of Holmby Productions v. Vaughn, 350 U. S. 870. Additionally, within the area of freedom of speech and press, the statute, and the application thereof below, denied appellant substantive and procedural due process of law ..... 9

1. The statutory standard—proscribing "obscene and indecent" literature—violates the decision in Holmby v. Vaughn, and is unconstitutionally vague and unconfined, and a censorial proscription of ideas and speech, violating freedom of press and speech under the First and Fourteenth Amendments to the United States Constitution ..... 9

2. This case presents in an important respect the same question posed in Butler v. Michigan, probable jurisdiction noted this term ..... 21

PAGE

3. The construction and application of the statute at bar and the prosecution conducted under the said statute in the proceedings below, particularly violate procedural and substantive due process of law, and deny and abridge freedom of speech, press and thought in particular and aggravated manner, all in contravention of the First and Fourteenth Amendments..... 23

II.

The statute, Penal Code, Section 311, as applied here to the mailing of circulars and the keeping of books for sale by mail is repugnant to Article I, Section 8, Clause 7 of the United States Constitution and unlawfully infringes on a sphere of activity reserved exclusively to the Federal Government respecting which the Federal Government has fully legislated, pre-empting the field..... 25

Appendix A. Opinion of the Appellate Department of the Superior Court .....App. p. 1

Memorandum Opinion denying a rehearing.....App. p. 4

# TABLE OF AUTHORITIES CITED


| CASES | PAGE |
|---|---|
| Attorney General v. Book Named "God's Little Acre," 326 Mass. 281, 93 N. E. 2d 819 | 17 |
| Bantam Books v. Melko, 25 N. J. Super. 292, 96 A. 2d 47 | 15 |
| Butler v. Michigan, No. 548, Oct. 1955 Term | 15, 21, 22, 23 |
| Cantwell v. Connecticut, 310 U. S. 296 | 11 |
| Carlson v. California, 310 U. S. 106 | 11 |
| Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U. S. 597 | 27 |
| Cole v. Arkansas, 333 U. S. 196 | 23 |
| Collins v. United States, 253 Fed. 609 | 23 |
| Commercial Pictures Corp. v. Regents of the University of New York, 346 U. S. 587 | 11, 18 |
| Commonwealth v. Friede, 281 Mass. 318, 171 N. E. 472 | 16 |
| Commonwealth v. De Lacey, 271 Mass. 327, 171 N. E. 455 | 17 |
| Commonwealth v. Gordon, 66 D. & C. 101 | 18, 21, 28, 29 |
| Commonwealth v. Isenstadt, 318 Mass. 543, 62 N. E. 2d 840 | 17 |
| Commonwealth v. Nelson, 104 A. 2d 133 | 24 |
| Cox v. New Hampshire, 312 U. S. 569 | 14 |
| Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 82 | 3 |
| DeJonge v. Oregon, 299 U. S. 353 | 23 |
| Edwards v. California, 314 U. S. 160 | 1 |
| Fontana v. United States, 262 Fed. 283 | 23 |
| Foster v. United States, 253 Fed. 481 | 23 |
| Garner v. Teamsters Union, 346 U. S. 485 | 27, 29, 30 |
| Gelling v. Texas, 343 U. S. 960 | 10 |
| Hague v. C. I. O., 307 U. S. 496 | 11, 13 |
| Herndon v. Lowry, 301 U. S. 242 | 11, 13, 15 |
| Hines v. Davidowitz, 312 U. S. 52 | 25, 27 |
| Holmby Productions, Inc. v. Vaughn, 177 Kan. 728, 282 P. 2d 412 | 9 |

PAGE

Holmby Productions, Inc. v. Vaughn, 350 U. S. 870, rehear. den. 350 U. S. 919 ..... 3, 9, 10, 12, 15
Hurtado v. California, 110 U. S. 516 ..... 24
Jackson, Ex parte, 96 U. S. 727 ..... 26, 27
Jones v. Opelika, 319 U. S. 103 ..... 12
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 ..... 10, 11, 19
Kunz v. New York, 340 U. S. 290 ..... 11
Largent v. Texas, 318 U. S. 418 ..... 11
Lewis v. Morgan, 229 U. S. 288 ..... 26
Lord Byron v. Dugdale (1823), 1 L. J. Ch. 239 ..... 16
Lovell v. City of Griffin, 303 U. S. 444 ..... 12, 27, 28
Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 287 ..... 13
Milwaukee Publishing Co. v. Burleson, 255 U. S. 407 ..... 26, 27
Moxon's Case (1841), 2 Townsend, Mod. St. Tr. 356 ..... 16
Murray v. Benbow, Jac. 474, note ..... 16
Musser v. Utah, 333 U. S. 95 ..... 11
Near v. Minnesota, 283 U. S. 697 ..... 10, 13, 15
New American Library of World Literature v. Allen, 114 Fed. Supp. 823 ..... 15
Niemotko v. Maryland, 340 U. S. 268 ..... 12, 13
Olesen v. Stanard, 227 F. 2d 785 ..... 29, 30
Pennsylvania v. Nelson, No. 10, Oct. Term, 1955, 24 L. W. 4165 ..... 25, 26, 27, 29, 30
People v. Alberts, 138 A. C. A. 513, 292 P. 2d 90 ..... 1
People v. Friede, 233 N. Y. Supp. 565 ..... 17
People v. Pesky, 243 N. Y. Supp. 193, aff'd 254 N. Y. 373, 173 N. E. 227 ..... 18
People v. Viking Press, 264 N. Y. Supp. 534 ..... 18
People v. Wepplo, 78 Cal. App. 2d (Supp.) 959 ..... 4, 18, 21, 22, 30
Poulos v. New Hampshire, 345 U. S. 395 ..... 14

PAGE

Public Clearing House v. Coyne, 194 U. S. 494 ..... 26
Saia v. New York, 334 U. S. 558 ..... 12
Schneider v. New Jersey, 308 U. S. 147 ..... 10
Smith v. O'Grady, 312 U. S. 329 ..... 23
Snyder v. Massachusetts, 291 U. S. 97 ..... 23
Southey v. Sherwood (1817), 2 Merivale 437 ..... 16
Stanard v. Olesen, 74 S. Ct. 768 ..... 30
Stanard v. Olesen, 121 Fed. Supp. 607 ..... 30
State v. Lerner, 81 N. E. 2d 282 ..... 19
Stromberg v. California, 283 U. S. 359 ..... 12, 15, 24
Superior Films, Inc. v. Department of Education, 346 U. S. 587 ..... 10
Thornhill v. Alabama, 310 U. S. 88 ..... 11, 14
United States v. One Book Entitled Ulysses, 72 F. 2d 705 ..... 30
Winters v. New York, 333 U. S. 507 ..... 3, 11, 15, 20, 22

MISCELLANEOUS

House Report No. 850, 83rd Cong., 1st Sess. ..... 26
House Report No. 1874, 82d Cong., 2d Sess. ..... 26
House Report No. 2510, 82d Cong., 2d Sess. ..... 26
House Resolution Nos. 596, 597, 82d Cong., 2d Sess. ..... 26
Senate Rep. 62, 84th Cong., 1st Sess. ..... 26
Weekly Variety, April 4, 1956, p. 5 ..... 20

STATUTES

California Constitution, Art. VI, Sec. 5 ..... 1
California Penal Code, Sec. 311, Subds. 3, 4 ..... 2, 3, 4, 5, 6, 8, 10, 18, 20, 21, 22, 25, 31
United States Code, Title 18, Sec. 1342 ..... 26
United States Code, Title 18, Sec. 1461 ..... 4, 26
United States Code, Title 28, Sec. 1257, Subd. 2 ..... 3

PAGE

United States Code, Title 39, Sec. 225 ..... 26
United States Code, Title 39, Sec. 259(a) ..... 4, 26
United States Constitution, Art. I, Sec. 8, Clause 7 ..... 2, 4, 26
United States Constitution, First Amendment ..... 2, 4, 20
United States Constitution, Fourteenth Amendment ..... 2, 4

TEXTBOOKS

10 Boston University Law Review, pp. 36, 47, note 54 ..... 17, 18
10 Boston University Law Review, pp. 36, 188, Grant and Angoff, Massachusetts and Censorship ..... 16
Buckley, Christian Design for Sex (1952) ..... 20
20 Contemporary Legal Problems, pp. 560, 561, Gardiner, Moral Definition of the Obscene ..... 20
4 Encyclopedia Britannica, pp. 246-247, Suppression of Books .. 16
Ernst and Seagle, To the Pure, Appendix II ..... 17
Haight, Banned Books, Introduction, pp. xi-xii ..... 16
20 Law and Contemporary Problems, Obscenity in the Arts, pp. 531, 591 ..... 19
Lippman's A Preface to Morals, pp. 285, 300 ..... 19

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October Term, 1955

No. .....

DAVID S. ALBERTS,

*Appellant,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

## JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles entered and filed December 29, 1955, rehearing denied January 12, 1956. The Appellate Department of the Superior Court is the highest state court available to appellant. (Calif. Const., Art. VI, Sec. 5; *Edwards v. California,* 314 U. S. 160.)

### Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles dated December 29, 1955 and the memorandum opinion denying a rehearing dated January 12, 1956 are both reported, *People v. Alberts,* 138 A. C. A. 513, 292 P. 2d 90. A copy of the Appellate Department's opinions and judgment is attached hereto as Appendix "A". The trial court wrote no opinion.

## Jurisdiction.

Appellant was convicted on two counts of violating California Penal Code, section 311, subdivisions 3 and 4, making it a crime to advertise or keep for sale obscene books. He was placed on summary probation for two years and as a condition thereof ordered to serve 60 days in the county jail and pay a fine of $500.00. [C. T. p. 6.] The cause is one in which the validity of Penal Code, Section 311, was drawn in question in the Statement on Appeal to the Appellate Department [C. T. p. 12, line 25, to p. 13, line 12] on the ground of its being repugnant to the First and Fourteenth Amendments to the United States Constitution and to Article I, Section 8, Clause 7 of the United States Constitution. The State Court, in affirming the validity of Penal Code, Section 311, as applied to appellant, notwithstanding his assertion that it was repugnant to the United States Constitution, said:

> 1. "The words 'obscene or indecent' as used in . . . section 311 are not unconstitutionally indefinite . . . To be sure, it is not always easy to decide on which side of the line a book should be placed. . . ." [C. T. p. 83.]
>
> 2. "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute (Section 311) inoperative." [C. T. p. 84.][1]

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[1]The Court did not discuss every feature of the case, saying in its memorandum opinion denying a rehearing [C. T. p. 99]:

> "We sympathize with the desire of counsel, who have earnestly argued a question, to have us explain how we arrived at an adverse answer. The number of cases that come before us is so great, however, that as a rule, we cannot gratify the understandable desire of counsel, for writing an opinion

Notice of Appeal to the Supreme Court of the United States was filed on March 26, 1956 in the Appellate Department of the Los Angeles Superior Court, State of California. [C. T. p. 257(a).][2] The jurisdiction of the Supreme Court to review this judgment is conferred by Title 28, United States Code, section 1257, subdivision 2. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 82; *Winters v. New York*, 333 U. S. 507; *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870.

## Statute Involved.

The statute, the validity of which was drawn in question, Penal Code, section 311, subdivision 3 and 4, provides:

"Every person who wilfully and lewdly, either: . . .

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . ."

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often takes more time than arriving at it. Our system of conference, before and after the call of the calendar, reduces to near the vanishing point the danger of one-man decisions, or decisions made without considering the points and authorities advanced."

[2]Volume 2 of Clerk's Transcript.

is guilty of a misdemeanor punishable by fine and imprisonment. As interpreted by the State Court: "A book is obscene 'if it has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desire.'" (*People v. Wepplo*, 78 Cal. App. 2d Supp. 959.) The statute was applied in this case to the *mailing* of circulars advertising books and the keeping of books for sale *by mail*. The federal constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, particularly the provisions thereof respecting freedom of speech and press and respecting the guarantee of due process of law, and Article I, section 8, clause 7 respecting the postal powers of the federal government. Federal statutes involved are 18 U. S. C., section 1461 and 39 U. S. C., section 259(a), dealing with advertising and mailing obscene matter.

## Constitutional Questions Presented.

This appeal presents the following questions under the Constitution of the United States:

(1) Whether the statute in the instant case, Penal Code, section 311, subdivisions 3 and 4, upon its face and as construed and applied, and the prosecution thereunder at bar, violates procedural and substantive due process of law and denies and/or abridges freedom of speech, press and thought, in contravention of the due process clause of the Fourteenth Amendment and the freedom of speech and press clauses of the First Amendment of the United States Constitution.

(2) Whether the statute in the instant case, Penal Code, section 311, subdivisions 3 and 4, as applied here to the *mailing* of circulars and the keeping of books for sale by *mail* is repugnant to Article I, section 8, clause 7 of the United States Constitution and unlawfully in-

fringes on a sphere of activity reserved exclusively to the federal government respecting which the federal government has fully legislated, preempting the field.

## Nature of the Case.

The judgment sought to be reviewed here is a criminal conviction in two counts under section 311, subdivisions 3 and 4 of the California Penal Code for the keeping for sale by mail and for advertising by mail "obscene and indecent" books.

The case against appellant consisted simply of proving that he had in his warehouse a large assortment of merchandise, including the merchandise and circulars introduced as exhibits. [C. T. p. 9.]

Prior to his arrest and on February 25, 1955 appellant was served with a search warrant, and his business office and business warehouse as well as his residence were searched. The arresting officers seized and carried off as matters material to the arrest books, pictures and related matters to the number of "hundreds or possibly thousands," removing the items in "automobiles and a small truck." [C. T. pp. 43, 116, 243.]

The complaint was in the exact language of the statute [C. T. pp. 1-2] and the charge against appellant was simply that in the matters seized he had somehow violated Penal Code, section 311, subdivisions 3 and 4. The offending books or other items were not identified. At the trial the District Attorney selected from the hundreds or thousands of items seized 31 books, 10 magazines and a large number of pictures and introduced them in evidence together with three different advertising circulars and mailing labels. Some of the books introduced by the prosecutor were not obscene even in the judgment of the prosecutor. [C. T. p. 190.] Appellant was not advised in

advance which of the many items seized would be relied upon in the trial. Commenting on the complaint the Appellate Department said that while in its opinion no legal error occurred, "a decent regard to fair play would dictate that some attempt be made to have the charge fit the known facts. . . ." [C. T. p. 83.]

While pictures and books were introduced in evidence, the Appellate Department stated that its judgment affirming the conviction was based only upon a "keeping for sale" and "advertising" of *books* found to be "obscene and indecent." That Court said: "The defendant was convicted on two charges based on section 311 of the Penal Code: that he had lewdly kept for sale obscene and indecent books and that he had lewdly written, composed and published an advertisement of them." [C. T. p. 82, lines 24-27.] Later on the Court said: "Moreover, while the type of pleading being considered lends itself to an unfair prosecution, actually, in this case, the defendant was not prejudiced; he would have been no better off had the charge been simply that he kept obscene books for sale." [C. T. p. 83, lines 18-22.] And finally the Court said: "That some of the books were obscene we do not consider debatable." [C. T. p. 84, lines 6-7.]

The books introduced were introduced in groups, as collective exhibits, thirty-one books and ten magazines being offered under eight exhibit numbers as follows: Exhibit 1 (11 books), Exhibit 5 (9 books), Exhibit 9 (5 books), Exhibit 10 (10 magazines), Exhibit 11 (1 book), Exhibit 21 (4 books), Exhibit 22 (1 book). These several books grouped by exhibit numbers were:

Exhibit 1: "Ballad of a Nun and Other Poems", "Homosexual Life", "Letters of the Courtesans", "How to be Married Though Happy or How to be Happy Though Married", "The Prostitute and Her Lover", "The

Love Affair of a Priest and a Nun", "Amorous Tales of the Monks", "Wild Women of Broadway", "Strange Marriage Customs", "Confessions of a Minister's Daughter", "The Fleece of Gold".

Exhibit 5: "Petting as an Erotic Exercise", "Bestiality and the Law", "Male Homosexuals Tell Their Stories", "The Business Side of the Oldest Business", "Questions and Answers About Oragenital Contacts", "The Picture of Conjugal Love", "William Heirens—Notorious Sex Maniac", "Female Homosexuals—Lesbians Tell Their Stories", "Bestiality in Ancient and Modern Times".

Exhibit 9: "To Beg I Am Ashamed", "Witch on Wheels", "The Pleasures of the Torture Chamber", "Snow Job", "She Made It Pay".

Exhibit 10: Ten different issues of "Good Times" magazine.

Exhibit 11: "Sword of Desire".

Exhibit 21: "Padlocks and Girdles of Chastity", "Straps and Stripes", "Memoirs of a Spankee", "Slaves of the Lash".

Exhibit 22: "Unique for Lovers of the Unusual".

The trial judge found obscenity in the books in Exhibits 9 and 11 although admittedly he did not read the books in their entirety. [C. T. p. 205, line 12; p. 208, lines 20-26.] He stated and ruled that the books in Exhibits 1 [C. T. p. 198] and 5 [C. T. pp. 201-205] were not obscene and that the books and magazines in Exhibits 10, 21 and 22 would not be considered by him for the reason they were not shown to be kept for sale. [C. T. p. 211.] On appeal appellant argued that he could not be convicted for possession of the books in Exhibits

9 and 11 for the reason that they were not shown to have been kept for sale although the books in Exhibits 1 and 5 were shown to have been kept for sale. Replying to this argument the State in its brief before the Appellate Department and in argument to that Court urged that affirmance of that conviction could and should be placed on Exhibits 1 or 5 or some of the books therein notwithstanding that the trial court had found such books not to be obscene. [C. T. p. 50.] Appellant argued that the Appellate Department could not properly affirm the conviction below upon evidence which the trial court found would *not* support a conviction. [C. T. p. 76.] Pressed between the arguments of appellant and respondent the Appellate Court failed to designate which books were the basis of the conviction, merely stating that some of the books were obscene. Accordingly, appellant knows no more after trial and affirmance than he knew before as to which particular books offended the law.

Regarding the question of using the mails the admitted fact is that appellant operated a mail order business. [C. T. p. 41, lines 10-12.] Everything from beginning to end was done by the mails. From his business office appellant mailed out circulars and received orders. [C. T. p. 239.] He would then fill the orders by mail from the merchandise kept in the warehouse. [C. T. p. 239.] There was no evidence that any circulars were mailed to anyone in California nor was there proof of any sales in California. Appellant was convicted under Count II (Pen. Code, sec. 311, subd. 4) for mailing circulars [C. T. p. 193, lines 21-22] and under Count I (Pen. Code, sec. 311, subd. 3) for keeping in his warehouse books to fill by mail orders received by mail. [C. T. p. 249, lines 7-10; p. 239, lines 11-25; p. 225, lines 2-17; p. 141, lines 4-24; Ex. 7.]

## THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

### I.

### The California Penal Statute—Proscribing "Obscene and Indecent" Writings and Books—Upon Its Face and as Construed and Applied to Appellant Violates Freedom of Speech and Press, and Conflicts With the Decision of Holmby Productions v. Vaughn, 350 U. S. 870. Additionally, Within the Area of Freedom of Speech and Press, the Statute, and the Application Thereof Below, Denied Appellant Substantive and Procedural Due Process of Law.

#### 1. The Statutory Standard—Proscribing "Obscene and Indecent" Literature—Violates the Decision in Holmby v. Vaughn, and Is Unconstitutionally Vague and Unconfined, and a Censorial Proscription of Ideas and Speech, Violating Freedom of Press and Speech Under the First and Fourteenth Amendments to the United States Constitution.

This Court in *Holmby Productions, Inc. v. Vaughn,* Oct. 24, 1955, 350 U. S. 870, rehear. den. 350 U. S. 919, held unconstitutionally vague and a violation of constitutional freedom of speech a state motion picture licensing statute proscribing motion pictures found to be "obscene". The state (Kansas) statute there involved provided for denial of licenses to pictures judged "obscene, indecent and immoral, and such as tend to debase and corrupt morals", and the State Supreme Court confined this by interpretation on appeal to the single term "obscene", holding that term valid and constitutional. (*Holmby Productions, Inc. v. Vaughn,* 177 Kan. 728, 282 P. 2d 412.) This Court reversed, holding the statute even as confined invalid and unconstitutional, citing *Joseph*

*Burstyn, Inc. v. Wilson*, 343 U. S. 495, and *Superior Films, Inc. v. Department of Education*, 346 U. S. 587. Although *Holmby* was without written opinion it is evident from the citation of the *Burstyn* and *Superior Films* cases its holding is that "obscene" is an unconstitutionally vague standard violating freedom of speech.

California Penal Code, Section 311, in prohibiting and providing penalty for "obscene and indecent" literature and writings establishes a standard indistinguishable utterly from the standard held void and unconstitutionally vague in the *Holmby* decision. In consequence the statute here as there is an invalid, censorial abridgement of freedom of speech and press, violating the First and Fourteenth Amendments.

The decision in *Holmby*, merely confirms and applies directly to the vague standard and term "obscene" the rule of a long accumulation of undeviating decisions of this Court holding void as against free speech, proscriptions or prohibitions against expression cast in vague, unconfined, censorial terms comparable in principle and in substance to the characterization "obscene", or to the similar term at bar, "indecent". Witness the standards or prohibitions held invalid in the decisions below listed:

*Near v. Minnesota*, 283 U. S. 697, 701-702 ("[any] malicious, scandalous and defamatory" publication);

*Schneider v. New Jersey*, 308 U. S. 147, 158 ("not of good character" or "not free from fraud");

*Gelling v. Texas*, 343 U. S. 960 ("[of] such character as to be prejudicial to the best interests of the people");

*Superior Films, Inc. v. Dept. of Education*, 346 U. S. 587 ("[not] of a moral, educational or amusing and harmless character");

*Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 497 ("sacrilegious");

*Commercial Pictures Corp. v. Regents of the University of New York*, 346 U. S. 587 ("immoral . . . or . . . of such a character [as] would tend to corrupt morals");

*Winters v. New York*, 333 U. S. 507, 518-519 ("criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting . . . crimes");

*Cantwell v. Connecticut*, 310 U. S. 296, 301-302, 305 (a cause not found to be "religious");

*Musser v. Utah*, 333 U. S. 95, 96 (speech constituting a "conspiracy" "to commit acts injurious to public morals");

*Thornhill v. Alabama*, 310 U. S. 88, 91-92 (picketing "without a just cause or legal excuse");

*Carlson v. California*, 310 U. S. 106, 109-112 ("loitering" or "picketing" for objects characterized by this Court as "sweeping and inexact");

*Largent v. Texas*, 318 U. S. 418, 419 ("proper or advisable");

*Hague v. C. I. O.*, 307 U. S. 496, 502, 516-517, (parading without approval of city officer under standard of "the purpose of preventing riots, disturbances or disorderly assemblage");

*Kunz v. New York*, 340 U. S. 290-291, 293 (licensing power under standard "for good reasons");

*Herndon v. Lowry*, 301 U. S. 242, 263-264 (prohibition of advocacy amounting in this Court's characterization "nearly to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that

he ought to have foreseen his words would have some effect in the future conduct of others");

*Stromberg v. California, supra*, 283 U. S. 359, 369 (prohibition of advocacy of "opposition to organized government" characterized by this Court as possessed of "indefiniteness and ambiguity" making it possibly inclusive of peaceful advocacy of change "by legal means and within constitutional limitations");

*Lovell v. City of Griffin*, 303 U. S. 444, 447-448 (leaflet licensing statute without any standard);

*Jones v. Opelika*, 319 U. S. 103, 104 (leaflet licensing statute without any standard);

*Saia v. New York*, 334 U. S. 558, 559-560 (sound truck permit statute without any standard);

*Niemotko v. Maryland*, 340 U. S. 268, 269-272 (Park address permit "custom" without any standard).

That the statute in *Holmby* was a licensing statute where the law here involved is a direct criminal enactment is not critical in significance and does not distinguish between the cases. Such difference is without significance or force where the question concerned is the question of whether the standard established for determining the permissible content of speech is invalid for being unconfined and unconstitutionally vague. While "prior restraint" as opposed to "subsequent punishment" may be more aggravated generally as a form for regulating speech, the central evil inhering in an unconfined and unconstitutionally vague standard affecting speech and press is the vice of *total and arbitrary power of censorship* inviting and authorizing the enforcer to punish or permit speech and press in purely discretionary manner and as dictated by his will alone. In the words of this

Court in *Near v. Minnesota*, 283 U. S. 697, 713, it is "this" which "is of the essence of censorship", and it is not critical in importance whether the person invested with such arbitrary totality of power over speech or press is privileged to exert it before or only after the fact of utterance or publication. The vice of *all* such statutes is that within the area of free speech they create "no narrowly drawn limitations; no circumscribing of . . . arbitrary power", but to the contrary subordinate liberty of expression to "the invalidity . . . of limitless discretion." (*Niemotko v. Maryland, supra*, 340 U. S. 268, 272.) They "license the jury [or other enforcing agency or officer] to create its own standard in each case." (*Herndon v. Lowry, supra*, 301 U. S. 242, 263.) Such a law is a ready "instrument of arbitrary suppression of free expression of views", and exercised or not "[makes] enjoyment of . . . freedom [of expression] which the constitution guarantees contingent upon the uncontrolled will of [governmental] officers." (*Hague v. C. I. O.*, 307 U. S. 496, 502, 516.) Such statutes violate the basic-most command of the constitution as to free speech that "restraint . . . be defined by clear and guarded language." (*Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 296.)

Even a prior restraint statute, such as one requiring a license or permit, may be valid and may be sustained if under its terms the licensing authority is rigidly denied "arbitrary power or . . . unfettered discretion" and is required to act upon licenses "free from improper . . . considerations and from unfair discrimination" and solely for such narrow considerations of public convenience as affect "the time, price and manner" of exercising speech or the right to parade. (*Cox v. New*

*Hampshire*, 312 U. S. 569, 576.) Prior restraint which is rigidly "uniform, nondiscriminatory" and "ministerial", and leaving to licensing boards "no discretion" over permissible content, is constitutional notwithstanding the restraint form. (*Poulos v. New Hampshire*, 345 U. S. 395, 402-404.) Equally, and by exactly counterpart considerations, a standard even for subsequent criminal punishment cast in so vague and indeterminate a manner as to permit the enforcer to exercise, assert or threaten arbitrary, discretionary and unconfined power of enforcement, as at bar, is unconstitutional, and is as censorial in consequence and effect as is arbitrary power in form of prior restraint.

> "A like threat [to the vice of prior licenseship under arbitrary, discretionary standard] is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective, or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by [arbitrary licenseship]."
>
> *Thornhill v. Alabama*, 310 U. S. 88, 98.

Accord: *Herndon v. Lowry*, 301 U. S. 242; *Stromberg v. California*, 283 U. S. 459; *Winters v. New York*, 333 U. S. 507; *Butler v. Michigan*, No. 548, Oct. 1955 Term, probable jurisdiction noted.

Moreover, the differences between subsequent and prior restraint can lose all substance where arbitrary standards are suffered to exist. In *Near v. Minnesota, supra*, the parent "prior restraint" case, the restraint most condemned was a continuing *future injunction* against any "malicious, scandalous and defamatory" writing by the defendant—a judicial order indistinguishable in substance and effect (save only for absence of right to jury trial in enforcement) from a criminal law prohibiting speech within a statutory category of comparable censorial terms. A statute as at bar falling upon "possession for sale" can operate as much in advance of actual distribution and reading as enforcement of a licensing or permit law. Additionally, as is well illustrated in the "obscenity" area, police threats under broad and loose criminal statutes, rising even to the issuance of lists of "disapproved" books, can as effectively smother and intimidate publication of expression as any conventional class of "prior restraint." (*Bantam Books v. Melko*, 25 N. J. Super. 292, 96 A. 2d 47; *New American Library of World Literature v. Allen* (U. S. D. C. E. D. Ohio, 1953), 114 Fed. Supp. 823.)

That the standard "obscene" at bar, held void in *Holmby*, is truly censorial and arbitrary is strongly confirmed by history. Illuminating examples of suppressions of notable works of criticism and of literature, confirm the gravity of the censorship power over free expression which inheres in punishment or prohibition of "obscene"

literature. The greatest classics of art and literature have been thus condemned.[3]

In *Lord Byron v. Dugdale,* 1 L. J. Ch. 239 (1823), the book "Don Juan" was held obscene. In *Southey v. Sherwood,* 2 Meriyale 437 (1817), Lord Eldon condemned the poem "Wat Tyler" as "not an innocent publication", and in *Murray v. Benbow,* Jac. 474, n., Lord Eldon ruled illegal as obscene Lord Byron's poem "Cain", and expressed misgiving as well about Milton's "Paradise Lost". In *Moxon's Case* (1841), 2 Townsend, Mod. St. Tr. 356, Shelley's "Queen Mab" was ruled an indictable offense.

Similarly, in our country, in *Commonwealth v. Friede,* 271 Mass. 318, 171 N. E. 472, a jury was suffered to find

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[3] " 'Gulliver's Travels', [was suppressed] in Ireland [because] considered obscene and detrimental to both government and morals; * * * And Dante's 'Devine Comedy' was burned in France in 1318, and fell under the Inquisition in Lisbon in 1581."

A. L. Haight "Banned Books", Introduction, pp. xi-xii.

"Those who have presumed to judge literature throughout the centuries of time have been guilty of gross blunders, absurd anomalies and ridiculous errors. When Dean Swift wrote his immortal, scathing satire on English life and politics, 'Gulliver's Travels,' he was denounced on all sides as wicked and obscene. Agitation was excited by the book. It was declared to be a vile and slanderous book, and the writer a lecherous hypocrite. But what has time done to this book? It is no longer considered as immoral and dangerous; instead, the satire has been overlooked, and the obscenity forgotten, and it is today a rare tale of adventure for the young. Lemuel Gulliver is no longer a symbol, the Yahoos represent nothing, the book is avidly perused by children with the same eagerness with which they read the adventures of the 'Rover Boys', or 'Deadwood Dick.'"

10 Boston Univ. L. Rev., "Massachusetts and Censorship," Sidney S. Grant and S. E. Angoff, 36, 188.

In IV Encyclopedia Britannica, "Suppression of Books," at pp. 246-247, it is stated:

"The list of prose works banned during past and present centuries includes Homer's 'Odyssey,' 'Cervantes' 'Don Quix-

"obscene" Theodore Dreiser's "An American Tragedy." In *Commonwealth v. Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840, a like fate befell Lillian Smith's "Strange Fruit." In *People v. Friede*, 233 N. Y. Supp. 565, Radclyffe Hall's "The Well of Loneliness," a serious study of Lesbianism, was held punishable as obscenity. In *Commonwealth v. De Lacey*, 271 Mass. 327, 171 N. E. 455, B. H. Lawrence's "Lady Chatterly's Lover" was similarly treated.

Contradictory results have been reached. In *Attorney General v. Book Named "God's Little Acre,"* 326 Mass. 281, 93 N. E. 2d 819, Erskine Caldwell's study of Southern Share-Cropper Life was found obscene and criminal, indeed so totally so as to be constituted thus as a matter of law and beyond room for difference of reading and requiring reversal of a contrary conclusion by the trial judge

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ote,' La Fontaine's 'Fables,' Defoe's 'Robinson Crusoe,' Swift's 'Tale of a Tub,' and 'Gulliver's Travels,' Voltaire's 'Candide,' Feilding's 'Pasquin,' Richardson's 'Pamela,' Casanova's 'Memoirs,' Goethe's 'Faust' and 'Sorrows of Werther,' Gibbon's 'Decline and Fall of the Roman Empire,' Sterne's 'Droll Stories,' Flaubert's 'Madam Bovary,' Maupassant's 'Une Vie' and 'L'Humble Verite,' Stowe's 'Uncle Tom's Cabin,' Hawthorne's 'The Scarlet Letter,' Eliot's 'Adam Bede,' George Moore's 'Flowers of Passion,' Zola's 'Nana,' Hardy's 'Tess of the d'Urbervilles,' Upton Sinclair's 'Oil,' Cabell's 'Jurgen,' Lawrence's 'Woman in Love,' Sinclair Lewis' 'Elmer Gantry,' and Remarque's 'All Quiet on the Western Front.' On the poetry roster we find Dante's 'Divina Commedia' and 'De Monarchia' Shelley's 'Queen Mab,' 'Rossetti's Poems,' Baudelare's 'Fleurs de Mal,' Whitman's 'Leaves of Grass,' Elizabeth Barrett Browning's 'Aurora Leigh,' and Swinburne's 'Poems and Ballads.'"

Books banned in Boston as "obscene" have included writings by such illustrious authors as: Sherwood Anderson, Conrad Aiken, John Ervine, Bertrand Russell, William Faulkner, Lion Feuchtwanger, Theodore Dreiser, H. G. Wells, John Dos Passos, Ben Hecht, Sinclair Lewis, Ernest Hemingway, Robert W. Service, and Judge Ben Lindsey. (Collected in Comment, 10 Boston Univ. L. Rev., "Massachusetts and Censorship," 36, 47, n. 54; see also Ernst and Seagle "To the Pure," Appendix II.)

in the lower court. The same book by the same author was found not obscene in New York in *People v. Viking Press,* 264 N. Y. Supp. 534, and likewise not obscene in Pennsylvania in *Commonwealth v. Gordon* (Pa.), 66 D. & C. 101. Similarly, in *Commercial Pictures Corp. v. Regents,* 346 U. S. 587, this Court reversed a motion picture censorship affecting the motion picture, "La Ronde." In *People v. Pesky,* 243 N. Y. Supp. 193 (affirmed, 254 N. Y. 373, 173 N. E. 227), the English translation of the ten dialogues by Arthur Schnitzler upon which the picture "La Ronde" had been based, appearing in the English translation under the title "Hands Around" was held criminally obscene.

"Gross blunders, absurd anomalies and ridiculous errors" (10 Bos. Univ. U. Law Rev. 36, 118) are necessary comcomitants of an attempt to condemn a book as obscene under the web of generalities woven into the definition of that term. This is particularly so where, as here, the statute is focused upon *thoughts,* rather than conduct. As interpreted California Penal Code, section 311, outlaws books which arouse "lascivious thoughts" and "lustful desires" (*People v. Wepplo,* 73 Cal. App. 2d (Supp.) 959).

> "But what kind of thoughts, desires, imaginations and impulses are impure, lascivious, lecherous, libidinous, lustful, lecherous (*sic*), sensual or sexual—apart from the fact that these terms relate to sex? Do these terms embrace all normal sexual intercourse? If so, within wedlock or only without? Or do they embrace only thoughts of sexual perversion?

> The cases clearly answer the last question. . . . Many books have been held obscene that deal only with normal sexual relations that could not possibly suggest thoughts of perversion."[4]
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> 20 Law and Contemporary Problems, Obscenity in the Arts, 531, 591.

It is unthinkable that in a democratic society, where government may make no law restricting freedom of thought and press, a man may be jailed for distributing a book which may arouse sex desires, especially in a day and age characterized by a revealing frankness and realism regarding sex. (See Arthur Lippman's "A Preface to Morals", pp. 285, 300, where he speaks of "man's immense preoccupation with sex", and of the "immense and urgent discussions of sex throughout the modern world".) Moreover the issue involved in censoring supposedly obscene matter goes much deeper than would appear at first sight. Much of what was said in *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 504-505, is here applicable:

> "This [standard of 'sacrilegious'] is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York Courts, the censor is set adrift upon a boundless sea amid a myriad of

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[4]Some courts have felt that the arousal of normal sexual desires is not criminal (*State v. Lerner* (Ohio), 81 N. E. 2d 282, 286):

> "Pure normal sex ideas are all right. All of mankind have sex ideas. Nature is aflame with sex ideas—the hoot of the owl, the coo of the dove, the blossoms of the flowers, plants and trees, the spawning of the fish. Sex is the why and wherefore of life and living."

> conflicting currents of religious views. . . . Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority."[5]

It is a major premise of the obscenity laws (including Penal Code section 311) and of the Catholic and some other religions that the arousal of sexual ("lustful") desires is wrong *per se*. This is by no means true of all religions. Under the First Amendment government should not force upon any segment of society the views of any religious sect.

If then the control of sex thoughts is a matter particularly invested with First Amendment overtones the following language from *Winters v. New York*, 333 U. S. 507, 510, is, *a fortiori*, applicable to the instant case.

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas [or to the distribution only of assumedly 'good' books]. The line between

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[5]The word "obscene" too is charged with religious significance. ". . . the word *obscenum* . . . is uncomplicated and clear in Catholic legal and moral thought; . . . it is, in fact, thought of as being rather self-evident." *Moral Definition of the Obscene* by Harold C. Gardiner, S. J. 20 Contemporary Legal Problems 560, 561. See Joseph Buckley, *Christian Design for Sex* (1952). Speaking of the question posed by the book *Played by Ear* by the late Rev. Daniel A. Lord a Jesuit priest who claimed that he and he alone authored Hollywood's Production Code, *Weekly Variety*, April 4, 1956, page 5, said:

> "What is unquestionably true, however, and borne out by current writings on the topic, is that the basic document originated entirely in Catholic quarters without reference to or consultation with spokesmen of other denominations. Defenders of the Code have always held that it is interdenominational in character, setting up a moral yardstick acceptable to all."

> the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

**2. This Case Presents in an Important Respect the Same Question Posed in Butler v. Michigan, Probable Jurisdiction Noted This Term.**

This term probable jurisdiction was noted in *Butler v. Michigan;* No. 548, October 1955 term. In that case, there was a conviction for distributing an obscene book. There, as here, the obscenity statute was attacked on the ground that the statute was so vague and indefinite, in form and as interpreted, as to permit within its scope the punishment of incidents fairly within the protection of the guarantee of free speech and press, in violation of the Fourteenth Amendment.

The Michigan and California statutes, as interpreted, are strikingly similar. Penal Code, section 311, has been authoritatively interpreted in the case of *People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, where the Court said:

> "A book is obscene 'if it has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desires. . . .'"[6]

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[6]"If an average man reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the pages that have no business there. How can anyone say that he will infallibly be affected one way or another by one book or another? When, where, how and why are questions that cannot be answered clearly in this field." (*Commonwealth v. Gordon* (Pa.), 66 D. & C. 101.)

The trial court in its oral opinion relied upon this language in the *Wepplo* case. [C. T. p. 197.] When an authoritative court interprets a statute the court's interpretation is put in the statute "as definite as if it had been so amended by the legislature." (*Winters v. New York*, 333 U. S. 507.)

As interpreted by the California courts, Penal Code, section 311(3) reads:

> "Every person who . . . keeps for sale . . . any obscene or indecent . . . book . . . which has a substantial tendency to . . . corrupt its readers by . . . arousing lustful desires"

is guilty of a misdemeanor.

The Michigan statute (M. S. A. 28.575) involved in *Butler v. Michigan* provides:

> "Any person who shall . . . possess with the intent to sell . . . any book . . . containing obscene, immoral, lewd or lascivious language . . . manifestly tending to the corruption of the morals of youth is guilty of a misdemeanor. . . ."

In *Butler v. Michigan*, one of the issues raised is whether the Michigan statute

> "is so vague and indefinite as not to comport with due process because its provisions prohibit and punish the publication and distribution of a book if such book contains matter which tends to incite minors to wrongful conduct and corrupt their morals—a wholly vague criminal prescription, predicated upon unascertainable and indefinite standards of conduct." (Appellant's Jurisdictional Statement, p. 4.)

Thus this case presents in important respect virtually the identical question posed in *Butler v. Michigan,* and should be considered with that case.

**3. The Construction and Application of the Statute at Bar, and the Prosecution Conducted Under the Said Statute in the Proceedings Below, Particularly Violate Procedural and Substantive Due Process of Law, and Deny and Abridge Freedom of Speech, Press and Thought in Particular and Aggravated Manner, All in Contravention of the First and Fourteenth Amendments.**

In this case, as we have seen, *supra,* pp. 5-8, the charge against appellant was so lacking in specificity, there were so many books involved, and such confusion as to which books the respective courts found criminally obscene that even now after affirmance on appeal it is impossible to determine in what particular appellant offended the law.

It is wrongful in *any* area of criminal law to deny an accused fair advance notice, both by law and by charge, of that which society prohibits by law and the particular by which he, the accused, is charged with having engaged in a violation. (*Collins v. United States,* 253 Fed. 609; *Foster v. United States,* 253 Fed. 481; *Fontana v. United States,* 262 Fed. 283.) Fair practice notice in both stated respects, and particularly by time of trial, is "the first and most universally recognized requirement of due process." (*Smith v. O'Grady,* 312 U. S. 329, 334; *Cole v. Arkansas,* 333 U. S. 196, 201; *DeJonge v. Oregon,* 299 U. S. 353, 362; *Snyder v. Massachusetts,* 291 U. S. 97, 105.) Punishment without fair statement of cause and of charge is blind and unconfined and meaningless, and serves only

to evidence and manifest absolute power, and to instill fear bred of such power. Such is the core of rule by men, not by law. All civilized, democratic societies, and certainly our constitutional one, condemns and forbids such. "Law [cannot be] mere will asserted as an act of power." (*Hurtado v. California,* 110 U. S. 516, 535.)

The above described procedure is particularly offensive here since all of this has occurred in the sensitive and crucial area of society affecting freedom of speech, press and thought—the area which is life-giving to the highest societal values of democratic self-government and the advancement of learning and the preservation of individual right and liberty. There particularly is it intolerable to suffer a statute, a prosecution and a judgment and affirmance having the features and consequences as in the cause here.

Moreover, under any view of the evidence books in Exhibits 1 and 5 or at least some of them are protected examples of the exercise of liberty of press, yet as seen above it cannot be ascertained from the statute and charge below and the Appellate Department affirmance but that the conviction rests in part or in whole upon such protected examples of free speech. This alone calls for reversal. (*Stromberg v. California,* 283 U. S. 359.)

## II.

## The Statute, Penal Code, Section 311, as Applied Here to the Mailing of Circulars and the Keeping of Books for Sale by Mail Is Repugnant to Article I, Section 8, Clause 7 of the United States Constitution and Unlawfully Infringes on a Sphere of Activity Reserved Exclusively to the Federal Government Respecting Which the Federal Government Has Fully Legislated, Preempting the Field.

As we previously pointed out, *supra,* page 8, appellant was in the mail order business and was convicted because he mailed circulars advertising books which were held to be obscene and because he kept those books for sale by mail. Before the Appellate Department appellant urged, on the authority of *Hines v. Davidowitz,* 312 U. S. 52, and *Commonwealth v. Nelson* (Pa.), 104 A. 2d 133, that Penal Code, section 311, as applied to the mailing of circulars and the keeping of books for sale by mail was invalid. In rejecting this argument the Appellate Department said [C. T. p. 84, lines 4-8]:

> "The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares . . . does not render the state statute (section 311) inoperative."

On April 2, 1956 this Court affirmed the Pennsylvania Supreme Court in *Pennsylvania v. Nelson* (No. 10, Oct. Term, 1955), 24 L. W. 4165, by a 6-3 majority. The Court there held that the federal government alone has jurisdiction over sedition and that state laws in the field

have been superseded by the passage of federal legislation.

The case at bar meets the several tests of supersession set forth in the *Nelson* case.

FIRST, the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Congressional power over the mails is practically plenary (*United States Constitution*, Article I, Section 8, Clause 7; *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407; *Lewis v. Morgan*, 229 U. S. 288; *Public Clearing House v. Coyne*, 194 U. S. 494; *Ex parte Jackson*, 96 U. S. 727) and Congress has fully legislated in the field making it a crime to advertise or mail obscene matter (18 U. S. Code, secs. 1342 and 1461) and denying the use of the mails to those who have advertised or mailed obscene matter. (39 U. S. Code, secs. 225 and 259(a).) And Congress is constantly considering additional regulation in the field (H. R. Rep. No. 850, 83rd Cong., 1st Sess.; H. R. Rep. No. 1874, 82nd Cong. 2d Sess.; H. R. Rep. No. 2510, 82nd Cong., 2d Sess.) and holding hearings (Investigation of Literature Allegedly Containing Objectionable Material, H. Res. Nos. 596 and 597; 82d Cong., 2d Sess.; Hearings on Obscene and Pornographic Materials, S. Resp. 62, 84th Cong., 1st Sess.).

The conclusion is inescapable that Congress has intended to occupy the field of obscenity in the mails. "Taken as a whole, they evince a Congressional plan which makes it reasonable to determine that no room has been left for the state to supplement the federal law." (*Pennsylvania v. Nelson, supra.*) Therefore, a state obscenity law touching the mailing of obscene matter "is superseded

regardless of whether it purports to supplement the federal law." (*Pennsylvania v. Nelson, supra.*) "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (*Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 604.) "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits." (*Garner v. Teamsters Union*, 346 U. S. 485.)

SECOND, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject. The power of Congress over the mails is broader and more complete than over interstate commerce. This is so because the government is the creator, owner and operator of the postal system whereas it merely regulates interstate commerce. In this area federal power is practically plenary. (*Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407; *Hines v. Davidowitz*, 312 U. S. 52.) Moreover, we are dealing here with the right of government to restrict the distribution of books, a matter peculiarly within this Court's protection. Freedom of press, of course, comprehends every sort of publication which affords a vehicle of information and opinion. (*Lovell v. Griffin*, 303 U. S. 444, 450.) Such liberty is protected at every step in the process of creation, publication and circulation from the writing and imprinting of the work until it reaches the hands of the ultimate reader. As Mr. Justice Hughes

said in the *Lovell* case, *supra*, at p. 452, quoting from *Ex parte Jackson*, 96 U. S. 727:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value."

Whether or not the term obscenity is unconstitutionally vague it is certainly vague. Accordingly, it is of the utmost importance that in this field government speak with one, and not many voices. It is bad enough that federal departments disagree with one another[7] without adding the confusion of 48 states each separately declaring, what is non-mailable because obscene.

Books traveling through the mails should not change their character from obscene to non-obscene as they travel from one jurisdiction to another. In this area there must be one national standard.

> "It is no longer possible that free speech be guaranteed Federally and denied locally; under modern methods of instantaneous communication such a discrepancy makes no sense. If speech is to be free anywhere, it must be free everywhere, and a law that can be used as a spigot that allows speech to flow freely or to be checked altogether is a general threat to free opinion and enlightened solution. What is said in Pennsylvania may clarify an issue in California, and what is suppressed in California may leave us the worse in Pennsylvania. Unless a re-

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[7] "Research discloses a curious but complete confusion between the Post Office and the Customs over what constitutes obscenity. No unanimity of opinion unites these two governmental services in a common standard. Books have cleared the port only to find the mails closed to them; others printed here have circulated freely while copies were stopped at the ports."

*Commonwealth v. Gordon* (Pa.), 66 D & C 101.

striction on free speech be of National validity, it can no longer have any local validity whatever."

*Commonwealth v. Gordon, supra.*

THIRD, enforcement of the state act presents a serious danger of conflict with federal administration of the subject. Plainly, different Courts define and interpret obscenity in many different ways. This can only lead to conflict.

"A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

*Garner v. Teamsters Union,* 346 U. S. 485, 490-491.

"Should the states be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned [in Garner v. Teamsters Union] but the added conflict engendered by different criteria of substantive offenses."

*Pennsylvania v. Nelson, supra.*

In the case at bar we do not merely have potential conflict. The circulars [Exs. 2 and 3] which were the basis of the conviction here under Count II were before the United States Court of Appeals for the Ninth Circuit in *Olesen v. Stanard,*[8] 227 F. 2d 785, and that Court found the circulars not to offend the federal obscenity statute. An examination of Exhibits 2 and 3 and Footnote 5, p.

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[8]Stanard is appellant's wife. Male Merchandise Mart is the name of the mail order business.

788 of the Court of Appeals opinion show the circulars to be substantially identical. The Court of Appeals there said:

> "The field of Appellee's operation within the law and within the representation of the circulars is a broad one and not every indelicacy or every suggestive matter is 'obscene, lewd, lascivious, indecent, filthy or vile . . .'"

On other occasions appellant's mail order business has also been before the federal courts (*Stanard v. Olesen,* United States District Court, Southern District, Central Division, No. 17026PH, unreported [C. T. p. 22]; *Stanard v. Olesen,* 121 Fed. Supp. 607, reversed in effect *Stanard v. Olesen,* 74 S. Ct. 768 (Mr. Justice Douglas, in chambers). In all these cases appellant's substantive position has been sustained in the federal courts.

Here we have "a multiplicity of tribunals . . . a diversity of procedures" (*Garner v. Teamsters Union, supra*) and an avowed "different criteria of substantive offense" (*Pennsylvania v. Nelson, supra*). The very court that affirmed the conviction here said in discussing the leading federal case of *United States v. One Book Entitled Ulysses,* 72 F. 2d 705:

> "We do not assent to everything said in that case which appears to have gone to the extreme of liberality in its interpretation of the statute in favor of the book."

*People v. Wepplo,* 78 Cal. App. 2d (Supp.) 959.

Since Congress has occupied the field to the exclusion of state legislation, and the dominant interest of the federal government precludes state intervention, and application of Penal Code, section 311, in the case at bar would conflict with federal control of the mails, the statute should be declared void as applied.

Respectfully submitted,

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*Attorney for Appellant.*

WILLIAM B. MURRISH, and
BROCK, EASTON, FLEISHMAN & RYKOFF,

*Of Counsel.*

## APPENDIX A.

People of the State of California, Plaintiff and Respondent, v. David S. Alberts, Defendant and Appellant. Cr. A. 3350.

Appellate Department, Superior Court, Los Angeles County, California. Dec. 29, 1955.

Rehearing denied Jan. 12, 1956.

C. Richard Maddox, Beverly Hills, Stanley Fleishman, Hollywood, for appellants.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

A. L. Wirin, Los Angeles, amicus curiae.

BISHOP, Judge.

The defendant was convicted on two charges based on section 311 of the Penal Code: that he had lewdly kept for sale obscene and indecent books; and that he had lewdly written, composed, and published an advertisement of them. A new trial was denied, and a sentence (its terms not divulged) was imposed. The appeal is from the order and judgment.

Section 311, Penal Code, declares a large number of acts, if lewdly done, to be a misdemeanor. Subdivision 3 of the section alone lists some nineteen of these acts, and in the first count of the complaint it was charged that the defendant had done all of them. Whatever may be said about the possibility that one who swears to such a complaint is guilty of perjury (for there was not the slightest proof that the defendant had committed most of the acts

charged), and that a decent regard to fair play, would dictate that some attempt be made to have the charge fit the known facts, it is not legal error to charge them all in one count. See People v. McClennegen, 1925, 195 Cal. 445, 452, 234 P. 91; Bealmear v. Southern Calif. Edison Co., 1943, 22 Cal. 2d 337, 340-343, 139 P. 2d 20, 22-23; People v. Rosenbloom, 1931, 119 Cal. App. Supp. 759, 762, 2 P. 2d 228, 230; and People v. Allington, 1951, 103 Cal. App. 2d Supp. 911, 914-919, 229 P. 2d 495, 497-500.

Two other facts support our conclusion that a reversal should not be had because of the shot-gun character of pleading. The first is, that even if it were error to charge the many acts with reference to many things, with no expectation of proving but a few of them, no attack was made upon the complaint by demurrer, as may now be done. Section 1004, Penal Code. Moreover, while the type of pleading being considered lends itself to an unfair prosecution, actually, in this case, the defendant was not prejudiced; he would have been no better off had the charge been simply that he kept obscene books for sale.

The words "obscene or indecent" as used in subdivision 3 of section 311, are not unconstitutionally indefinite. As early as 1896 the United States Supreme Court knew their meaning. Swearingen v. U. S., 1896, 161 U. S. 446, 451, 16 S. Ct. 562, 40 L. Ed. 765, 766, and a large number of cases since then have been decided on the theory that their meaning was not obscure. See Annotation, 76 A. L. R. 1099, and People v. Wepplo, 1947, 78 Cal. App. 2d Supp. 959, 961, 17 P. 2d 853, 855.

To be sure, it is not always easy to decide on which side of the line a book should be placed, but if a difficulty of that sort sufficed to condemn a statute, then we could not declare it to be a crime to drive while under the influence of liquor, or to induce a person to part with his property by a false pretense, or to kill with malice aforethought.

The circumstance that the defendant made use of the United States mails to advertise and to distribute his obscene wares—and that some of his books were obscene we do not consider debatable—does not render the state statute, section 311, inoperative. See *In re* Phoedovius, 1918, 177 Cal. 238, 246, 170 P. 412; Zinn v. State, 1908, 88 Ark. 273, 114 S. W. 227, 228; *Ex parte* Williams, 1940, 345 Mo. 1121, 139 S. W. 2d 485, 491, which cites *In re* Phoedovius, *supra*, certiorari denied in U. S. Supreme Court, Williams v. Golden, 311 U. S. 675, 61 S. Ct. 42, 85 L. Ed. 434; Railway Mail Ass'n v. Corsi, 1945, 326 U. S. 88, 95, 65 S. Ct. 1483, 89 L. Ed. 2072, 2077.

We see no good purpose to be served by a discussion of either the evidence, which we find sufficient to support the judgment, or of the other contentions advanced.

The order and judgment appealed from are affirmed.

SHAW, *P. J.*, and SWAIN, *J.*, concur.

On Motion for Rehearing

Before BISHOP, P. J., and PATROSSO and SWAIN, JJ.

BY THE COURT.

The petition of appellant for a rehearing after judgment of this court on appeal, in the above entitled matter, having been filed, and having been duly considered,

Said petition is hereby denied.

Memorandum.

In his petition for a rehearing, the defendant reveals that he shares a misunderstanding of the duty resting upon this Department, with respect to the writing of opinions, that is so widely held that it calls for a comment. Referring to the pronounced silence in our opinion, on a proposition he had argued, the defendant stated; "a proper consideration for the parties and this Court's duty to declare the law would seem to require some comment on the question posed."

Throughout the past twenty-five years, "this court" has recognized a duty "to declare the law" in only a very limited number of cases. To begin with, the requirement of Article VI, section 24, of the State Constitution, that "all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and the grounds of the decision shall be stated" obviously does not apply to us. Moreover, Rule 6, of the rules adopted by the Judicial Council for the government of appellate departments, declares that "The judges of the Appellate Depart-

ment shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest."

We sympathize with the desire of counsel, who have earnestly argued a question, to have us explain how we arrived at an adverse answer. The number of cases that come before us is so great, however, that as a rule, we cannot gratify the understandable desire of counsel, for writing an opinion often takes more time than arriving at it. Our system of conference, before and after the call of the calendar, reduces to near the vanishing point the danger of one-man decisions, or decisions made without considering the points and authorities advanced.

Now and then a case comes before us involving a question that is little likely to be solved, at any early time, by either the Supreme Court or one of the district courts of appeal, but which will frequently reappear before the more than eighty municipal court judges whose judgments come to us on appeal. Examples readily come to mind: the unlawful detainer actions under the rent regulations; violations of a newly created offense punishable only as a misdemeanor. In this class of cases we recognize a duty "to declare the law." Even in such cases we feel under no duty to comment on every contention that may be made. We do not believe that we should follow practices that add unnecessarily to the number of law books that the profession must buy and provide shelves to house.